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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

JANE DOE, an individual using a pseudonym,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., RASIER,
LCC, RASIER CA, LLC,

Defendants.

Case No. 3:19-cv-03310-JSC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Judge: Hon. Jacqueline Scott Corley
Date: August 16, 2022
Time: 9:00 a.m.
Crtrm.: E

**Assigned to Magistrate Judge Jacqueline
Scott Corley**

Action Filed: June 12, 2019
Trial Date: September 12, 2022

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<i>Intercargo Ins. Co. v. Burlington Northern Santa Fe RR</i>	
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<i>Johnson & Johnson Talcum Powder Cases</i>	
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Other Authorities

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Restatement (Second) of Torts § 314A & *cmt. b* (1965)..... 23

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Restatement (Third) of Torts § 37 & *cmt. c* (Am. Law Inst. 1975) 17, 21

Restatement of Torts § 449 (1965) 25

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1 **I. INTRODUCTION**

2 Uber takes the position, in reliance on *Jane Doe No. 1 v. Uber Techs, Inc., infra*, that, so
 3 long as it does not actively encourage criminals to sexually assault its riders and so long as sexual
 4 assault is not a “component” of its business model, it owes its riders no duty to protect them from
 5 the sexual predators who exploit its platform. This position is not only repugnant to basic notions
 6 of accountability and common sense, but it is also inconsistent with California law. As
 7 California’s highest court has reaffirmed time and again, California follows the Restatement
 8 (Third) of Torts in holding that companies like Uber have a duty not to unreasonably increase the
 9 risk of injury to others, including foreseeable injury from third party criminal conduct. *See Brown,*
 10 *infra*, 11 Cal.5th 204; *Lugtu, infra*, 26 Cal.4th 703; *Weirum, infra*, 15 Cal.3d 40; *Richardson,*
 11 *infra*, 44 Cal.2d 772; and *McEvoy, infra*, 32 Cal.2d 295.

12 There is abundant evidence (and certainly at least a genuine dispute of material fact) that
 13 Uber breached this duty. Uber took over the transportation industry by convincing riders it is safe
 14 to get into a stranger’s personal vehicle, isolated and alone, so long as the stranger is affiliated
 15 with Uber. It communicates this affiliation using its trade dress. Yet, for the sake of expedience, it
 16 chooses to use a paper decal as its trade dress and makes no effort to recover its trade dress from
 17 known sex offenders. It knows that “there have been numerous incidents and allegations [of]
 18 individuals impersonating Drivers, sexually assaulting, abusing, kidnapping and/or fatally injuring
 19 consumers...” (RFJN Exh. A at p. 17.) By May 2017 it knew these incidents had “reached crisis
 20 levels.” (Peters Decl., Exh. 3 at 158:6-160:13.) Nevertheless, Uber has never considered the
 21 possibility that it might bear some responsibility for these incidents. If a woman accidentally gets
 22 into the wrong Uber and is assaulted, Uber categorizes that incident as “invalid.” It does not track
 23 these incidents, nor study their root causes, nor tell its riders not to rely on the trade dress.

24 With respect to Mr. Sherman in particular, he was a former driver on Uber’s platform.
 25 Twice within six months, Uber riders credibly accused him of kidnapping and sexually assaulting
 26 women on its platform. The first time, despite GPS evidence that corroborated the rider’s account,
 27 Uber refused to deactivate him since the evidence was not “conclusive.” It sent him a letter
 28 downplaying his conduct, saying that he may have been misperceived as being “flirtatious,” and

1 reassuring him that he was a “valued partner.” And it shielded him from a criminal investigation
 2 by misleading the reporting party to think that Uber was already communicating with law
 3 enforcement. After the second reported assault, Uber deactivated Sherman but allowed him to
 4 keep the trade dress that would let him to continue exploiting its platform. Finally, rather than
 5 communicate to Jane Doe and other riders what Uber alone knew – that its trade dress was an
 6 unreliable indicator of trustworthiness and that safety required riders to always check the license
 7 plate – Uber actively advertised that its App users could call rides for guests even if those guests
 8 did not have a working smartphone. That is exactly what Jane Doe’s boyfriend did for her. Ms.
 9 Doe’s phone battery was dead and, seeing the trade dress on Mr. Sherman’s window, she got into
 10 his vehicle. A harrowing ordeal followed.

11 There is ample evidence that Uber breached its duty, and this case should go to a jury.

12 **II. RELEVANT FACTS**

13 **A. Uber Knew Its Riders Were Being Harmed by Sexual Predators Posing as Uber Drivers, but Chose Not to Acknowledge, Study, or Address this Risk.**

14 **1. Even before launching its peer-to-peer transportation service, Uber 15 knew or should have known there was a risk sexual predators would 16 exploit it to pose as Uber drivers.**

17 Uber is a novel form of application-supported transportation company. RFJN Exh. B
 18 (CPUC Decision 13-09-045) at pp. 2 & 68. “Fundamentally the way that the Uber app works is it
 19 matches riders who need a ride with drivers who are online and available to provide a ride.” Decl.
 20 of Sara M. Peters (“Peters Decl.”), Exh. 4 (Baker Depo, Vol. I) at 29:10-16. The “peer-to-peer”
 21 ride takes place in a non-professional driver’s personal vehicle. RFJN, Exh. B, at p. 2. The rider
 22 and driver are almost always strangers to one another. Peters Decl., Exh. 11 (Silver Depo.) at
 23 37:18-38:7. By placing these two strangers together in an isolated setting, i.e., a private vehicle,
 24 with limited means for the rider to escape, Uber creates a foreseeable opportunity for sexual
 25 violence. Decl. of Elizabeth Jeglic, Ph.D. (“Jeglic Decl.”) at ¶ 5. It should have used “failure mode
 26 and effects analysis” to identify, assess, and mitigate the risk that its platform would create
 27 opportunities for criminals, including sexual predators, to pose as Uber drivers. Jeglic Decl. at
 28 ¶9(b); Decl. of Cynthia Rando (“Rando Decl.”) at ¶ 19; Decl. of Joseph A. Donndelinger

1 (“Donndelinger Decl.”) at ¶¶ 14-21.

- 2 **2. After launching its peer-to-peer transportation service, Uber knew for**
3 **a fact that sexual predators were regularly exploiting its service to pose**
4 **as Uber drivers and assault Uber riders.**

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Exh. E, Uber Comment regarding Rulemaking 12-12-011, p. 2 (2013 launch).

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4 In 2018, using a simple google search, Uber found 35 reports in 2017 and 24
5 reports in 2018 of people posing as Uber drivers to assault riders. Peters Decl., Exh. 3 at 90:17-
6 94:22, 141:6-23, Exh. 9 to Page Depo, Vol. III; Peters Decl., Exh. 2 at 287:17-293:11, Exh. 6 to
7 Page Depo, Vol. II. Based on the Google search, and known underreporting, Uber estimated that
8 these incidents occurred once per week. Peters Decl., Exh. 3 at 161:17-162:1, Exh. 9 to Page
9 Depo, Vol. III.

10 In May of 2017, Uber's policy team stated that the issue of imposter drivers had "**reached**
11 **crisis levels.**" Peters Decl., Exh. 3 at 158:6-160:13, emphasis added. In its 2019 Annual Report,
12 unlike in its rider-facing communications, Uber acknowledged: "There have been **numerous**
13 **incidents** and allegations worldwide of Drivers, or **individuals impersonating Drivers**, sexually
14 assaulting, abusing, kidnapping and/or fatally injuring consumers, or otherwise engaging in
15 criminal activity while using our platform or claiming to use our platform." RFJN, Exh. A (2019
16 Annual Report) at p. 17, emphasis added; Peters Decl., Exh. 1 at 20:3-23:2.

17 **3. Uber chose not to gather, track, or study data about sexual predators**
18 **posing as Uber drivers, nor to conduct any analyses to address the root**
cause of the problem.

19 Uber should have realized these incidents constituted a situational risk for its customers,
20 which it had the capability and moral obligation to address in an evidence-based manner. Jeglic
21 Decl. at ¶¶ 5-11; Rando Decl. at ¶¶ 11-23; Donndelinger Decl. at ¶¶ 24-30 & 39-51.

22 Uber did not do so. Instead, if an Uber rider accidentally got into the wrong vehicle, Uber
23 dismissed that report as "**invalid.**" Peters Decl., Exh. 5 (Depo. of Matthew Baker, Vol. II) at
24 115:14-119:19. Uber places the blame for these incidents on the rider, saying "if somebody's not
25 getting into the right car, that means they're not verifying the information that's provided." Peters
26 Decl., Exh. 1 at 178:8-179:2. Uber excludes these incidents from its public safety reporting. Peters
27 Decl., Exh. 8 (Depo. of Brittany Anthony) at 146:12-147:14.

28 Consequently, Uber does not attempt to track the incidents where someone poses as an

1 Uber driver and hurts a rider. Peters Decl., Exh. 1 at 186:6-187:14; Peters Decl., Exh. 5 at 184:17-
 2 187:14. It cannot reconstruct or begin to estimate the number of such incidents. Peters Decl., Exh.
 3 6 at 256-9-259:10; *id.* at 47:11-48:13, 112:22-113:5, 255:21-256:22; Peters Decl., Exh. 9 (Depo.
 4 of Akanshu Dhawan) at 173:5-6. It has not performed a root cause analysis of why people end up
 5 getting into the wrong car. Peters Decl., Exh. 1 at 144:23-145:1; Peters Decl., Exh. 3 at 84:1-14;
 6 Peters Decl., Exh. 9 at 173:24-175:19.

7 **B. Uber Negligently Gave Drivers, Including Known Sexual Predator Sherman,**
 8 **the Tools to Easily Pose as Uber Drivers and Sexually Assault Riders**

9 **1. Uber knew or should have known that riders would view vehicles**
 10 **bearing its trade dress as affiliated with Uber and therefore**
 11 **trustworthy**

12 CPUC regulation requires that Uber “display consistent trade dress (i.e. distinctive signage
 13 or display on the vehicle) when providing TNC services” that “shall be sufficient to **allow a**
 14 **passenger, government official, or member of the public to associate a vehicle with a**
 15 **particular TNC**” (RFJN, Exh. B, at p. 31, ¶ h, emphasis added.) The CPUC found that:
 16 “Uber **by its name alone** is selling a type of car service.” RFJN, Exh. B at pp. 16-17, emphasis
 17 added. Uber knew the purpose of the trade dress was to associate a vehicle with Uber. Peters
 18 Decl., Exh. 10 (Deposition of Briana Lambert) at 170:17-24; Peters Decl., Exh. 11 at 125:3-13;
 19 Peters Decl., Exh. 7 (Deposition of Wade Stormer) at 140:9-16. It was also reflexive for Uber’s
 20 riders to understand Uber’s trade dress in this way, since Uber’s transportation service competed
 21 with taxis, and Uber leveraged people’s existing understanding or mental models of how taxi
 22 services worked. Rando Decl. at ¶¶ 41-45.

23 Uber claims customers can trust the company to keep them safe when they get into a
 24 stranger’s car. Wade Stormer, Uber’s Senior Law Enforcement Liaison, agrees that: “**Every time**
 25 **someone opens the Uber app, they are putting their trust in Uber to not only get them from**
 26 **place to place but to help keep them and their loved ones safe.**” Peters Decl., Exh. 7 at 158:25-
 27 159:13; see also Peters Decl., Exh. 4 at 34:19-35:5 (“riders do depend on Uber to provide them
 28 with a safe trip”). When Uber sends a driver to a rider’s location, it is “vouching for that ride—for
 that driver, saying: ‘We’ve done a background check, and based on what we know about this

1 driver we feel comfortable sending this driver to you. . . .” Peters Decl., Exh. 4 at 35:7-19.

2 Since Uber is imbuing anonymous drivers with trustworthiness, its ability to sell rides
3 depends on its goodwill. Uber’s Senior Manager of Business Operations, acknowledged this when
4 he testified before the CPUC: “**Uber works hard to develop [its] goodwill**, which is difficult to
5 reestablish.” RFJN, Exh. D (05.18.2022). For that reason, Uber’s Global Safety Brand Insights
6 Program conducts surveys regarding the “perception [of] how Uber is committed to safety” Peters
7 Decl., Exh. 12 (Deposition of Abbie Ding Depo) at 48:24-49:10 and seeks to “increase the safety
8 sentiment” *Id.* at 49:24-50:4 & 13:11-14:3. Uber strives to have its riders feel safe when they are
9 using its platform. Peters Decl., Exh. 4 at 33:5-14; *Id.* at 33:12-17. Not surprisingly, people who
10 feel like Uber is committed to safety are more likely to use Uber. Peters Decl., Exh. 12 at 61:9-14.
11 Uber’s efforts to make riders feel safe getting into strangers’ cars have been successful – so much
12 so that the word “Uber” is now used as a verb and, as of 2017, Uber provided over 41% of all paid
13 car rides in the United States. Bamberger & Lobel, Platform Market Power (2017) 32 Berkeley
14 Tech. L.J. 1051, 1056.

15 **2. Despite the known risks, Uber chose to use inexpensive and easy-to-**
16 **duplicate logo decals as the way to identify an Uber.**

17 Given Uber’s knowledge that (1) people were getting into strangers’ cars in reliance on
18 drivers’ apparent affiliation with Uber, and (2) Uber’s trade dress indicated that affiliation, Uber
19 knew or should have known that, if it allowed its trade dress fell into the wrong hands, riders
20 would be at an increased risk for sexual assault.

21 The CPUC allowed Uber to choose its own trade dress so long as it was visible and
22 recognizable. RFJN, Exh. B, at p. 31, ¶ h. The CPUC did not specify the material to be used,
23 whether it should be traceable, or whether there should be other security features to prevent its
24 misuse, or whether other measures should be taken to mitigate the risk of imposter drivers
25 assaulting Uber riders. (*Id.*) Uber chose to use “Uber decals or stickers” that drivers put in their
26 windows. Peters Decl., Exh. 6 at 130:4-7. Presumably, Uber chose a cheap, less secure form of
27 trade dress because it allowed for faster onboarding of drivers, and therefore a competitive
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1 advantage.²

2 **3. Before Ms. Doe was attacked, Uber knew that sexual predators with**
 3 **access to its trade dress were exploiting Uber’s goodwill to gain access**
 4 **to Uber’s riders.**

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13 In fact, although Uber became aware of numerous incidents of riders getting into vehicles
14 of sexual predators posing as Uber drivers, Uber cannot say how many of these involved an Uber
15 logo decal. Peters Decl., Exh. 6 at 38:14-40:18. This is because Uber, when it investigates these
16 incidents, chooses not to ask these riders whether an Uber logo decal was involved (Peters Decl.,
17 Exh. 6 at 24:7-25:20; 24:11-25:18, 32:5-24, 39:2-9. In many cases, “there may have been an Uber
18 decal displayed, there may not have been,” but Uber just cannot tell one way or the other. *Id.* at
19 24:7-17. Thus, Uber’s corporate designee on the topic of “the dates and details of all incidents
20 where someone displaying an Uber decal picks up riders and assaults them” had no sense for the
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22 ² In response to interrogatories seeking the identity of those involved in its trade dress decision,
23 Uber responded that it “currently lacks institutional knowledge regarding which individual(s)
24 ‘made the decision (individually or collectively) to distinguish Uber Drivers’ vehicles using a
25 stick-on Uber Decal.’” Peters Decl., Exh. 24 (Uber’s Second Supplemental Response to
26 Interrogatory No. 10). The employee who verified this response had no knowledge about how the
27 trade dress was chosen. Peters Decl., Exh. 5 at 86:21-87:24. The jury may reasonably infer, and
28 may even be instructed to presume, that Uber was choosing to put profits over safety, adopting
cheap trade dress for fast onboarding of drivers, without considering the risk. If Uber attempts to
rebut this inference, the jury should be instructed to distrust Uber’s evidence given its inability to
identify a single person actually involved in the decision-making. See Fed. Rules of Evid., Rule
302 (state law governs the effect of a presumption regarding a claim or defense for which state law
supplies the rule of decision); see also California Evid. Code sec. 412 (if a party offers weaker
evidence when it was within the party’s power to produce stronger evidence, the evidence offered
should be viewed with distrust).

1 magnitude of the problem and could not identify any effort by Uber to track the number of such
 2 incidents. *Id.* at 122:17-123:23. Moreover, Uber's corporate designee was not even familiar with
 3 the numerous prior similar incidents that Plaintiff's counsel located in Uber's own records. See,
 4 e.g., *Id.* at 194:19-198:7,

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10 **4. Uber knew its former driver Brandon Sherman was a sexual predator**
 11 **but, despite the foreseeable risk, let him keep its trade dress.**

12 On April 21, 2017, Mr. Sherman became an authorized Uber driver. Peters Decl., Exh. 6 at
 13 25:15-27:11, Exh. 4 to Baker Depo, Vol. III. Uber provided him with decals to identify his vehicle
 14 as an Uber. Peters Decl., Exh. 7 at 140:9-16; Exh. 23 (letter to Sherman confirming decals).)

15 On January 5, 2018, less than six months after Sherman performed his first ride on the
 16 platform, Uber received a message from one of his riders reporting that he had kidnapped and
 17 sexually assaulted her.

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27 Uber put a hold on Sherman's account but reactivated him the next day, and again allowed
 28 him to pick up Uber customers. Peters Decl., Exh. 4 at 84:17-85:2; Exh. 10 at 116:22-117:3, Exh.

6 to Lambert Depo. On June 9, 2018, another foreign-born Uber rider reported that Sherman had kidnapped and sexually assaulted her. Peters Decl., Exh. 13 (Depo. of Billie Garrett) at 209:14-211:15, 218:2-12, Exhs. 7 & 8 to Garrett Depo.

Uber had an obligation to retain control of company identification which would enable an employee terminated for allegations of sexual assault access to situationally vulnerable individuals. Jeglic Decl. at 16. However, Uber made no effort to retrieve its decals from Mr. Sherman.³ Peters Decl., Exh. 13 at 218:21-220:7 [this practice has since changed]; Peters Decl., Exh. 13, Exh. 9 to Garrett Depo. [showing no language directing Sherman to return or destroy the decals]; Peters Decl., Exh. 14 (Deposition of Lilli Flores) at 73:24-75:9.

C. Uber Enabled and Emboldened Sherman to Continue Preying on Its Riders by Dealing Lightly with His Assaults, and Shielding Him from Criminal Consequences

1. Uber dealt lightly with Sherman's first sexual assault and kidnapping, describing it as "flirtation" and encouraging him to continue driving.

The report Uber received on January 5, 2018 described kidnapping and sexual assault, and

³ Uber claims that its "**Transportation** Services Agreement" with Sherman demonstrates that it "'terminate[d] [its] consent to [the decals'] use' when it deactivated him from the platform." (Mtn. at 16:18-26.) Not so. The contract, actually titled **Technology** Services Agreement, states that the driver "shall not . . . access or use the Uber Services or Driver App to . . . attempt to gain unauthorized access to the Uber Services or its related systems or networks." (Baker Decl., Exh. A at ¶ 5.2.) Uber Services and Driver App are not defined to include trade dress. (*Id.* at ¶¶ 1.6 and 1.13.) Paragraph 5.3 merely says that the driver shall not use the logos and trade dress "for any **commercial** purpose" except as permitted by Uber. (*Id.* at ¶ 5.3.)

(potentially) attempted rape. Declaration of Sumerle Pfeffer Davis, (“Pfeffer Decl.”) at ¶ 5 Pfeffer Decl. at 9-14. In allowing him to keep driving, the SIU was following Uber’s policy that a credible report of sexual assault would only result in permanent deactivation if it were “conclusive” or the second such report. Peters Decl., Exh. 10 at at 139:2-141:14, 145:19-146:24. Uber deems an incident conclusive only if there was (1) an admission of guilt, (2) photo or video evidence of the assault or associated injury, or (3) police report or court findings that the driver was guilty. *Id.* at 139:2-141:14. Practically, this meant almost no initial allegations of sexual assault were considered conclusive while this policy was in effect. *Id.* at 141:15-144:22.

In reactivating Sherman, SIU sent him a email that grotesquely mischaracterized the gravity of the allegations, saying: “Your rider claims that some of your actions **may have come off as flirtatious**, or as advances towards them. . . . **We appreciate and value you as an Uber partner**... [Y]our account is now active and you will be able to accept trip requests effective of this email, Brandon.” *Id.* at 124:3-11, 155:7-23, Exh. 6 to Lambert Depo. at pp. 1-2 (emphasis added). Uber did not tell Sherman that he had been accused of sexual assault. Peters Decl., Exh. 4 at 110:2-5. By calling a credible allegation of kidnapping and sexual assault “flirtatious” Uber conveyed to Sherman that his misconduct was innocent and merely misinterpreted. By allowing him to keep driving without consequence, Uber sent Sherman the message that he would escape consequences. Jeglic Decl. at ¶¶ 12-15. When sexual violence perpetrators offend without consequences, this is a risk factor that increases the probability of re-offense. *Id.*

2. Uber shielded Mr. Sherman from legal consequences for his prior sexual assaults by making it difficult and confusing for potential victims to report to law enforcement.

The goals of riders who report sexual assault and rape to Uber are usually to protect other women in the future. Decl. of Lynn E. Ponton, M.D. (“Ponton Decl.”) at ¶ 6-8. But Uber’s investigators who received such reports were there to protect the company’s reputation over the riders’ interests in preventing future harm. Peters Decl., Exh. 14 at 33:16-34:8. Uber strictly prohibits SIU investigators from ever contacting law enforcement about completed crimes, no matter how credible and serious. Peters Decl., Exh. 14 at 35:21-36:2, 38:12-20; Peters Decl., Exh. 10 at 33:14-34:6. And Uber does not tell the reporting party: “We’re not going to be report this to

1 the police. If you want to do that, that something you need to do.” Peters Decl., Exh. 13 at 198:4-
 2 15. In fact, Uber does not even give the reporting party information about **how** to contact law
 3 enforcement. Peters Decl., Exh. 14 at 46:23-47:7; 48:11-25.

4 In its conversation with the non-English-speaking woman who reported the January 5,
 5 2018 assault (the “Reporting Party” or “RP”), the SIU investigator, following an Uber script,
 6 conveyed to her that there would be serious consequences to Sherman, saying “under no
 7 circumstances is that type of behavior acceptable or tolerated on the Uber app.” Peters Decl. Exh.
 8 27 (Transcript of Call) at 3:23-25. The RP asked for guidance about going to law enforcement
 9 saying that she was unsure what to do since she is only a student. *Id.* at 4:18-5:12. She expressed
 10 interest in making a criminal report, saying “please give me the info for the law enforcement.” *Id.*
 11 at 5:13-23. Uber’s SIU agent said: “Will do.” *Id.* at 5:24. Uber’s email, in English, was
 12 misleading. It made it sound as though Uber was taking immediate and decisive action, saying
 13 “we have initiated an internal investigation,” reports like these are taken “very seriously,” and
 14 drivers “have been deactivated for reports of much less.” Peters Decl., Exh. 10, Exh. 5 at p. 2. The
 15 email made it sound as though Uber was already working with law enforcement, saying “we have
 16 a Law Enforcement Response Team that works with local authorities” and “we will cooperate with
 17 law enforcement’s investigation through the necessary channels.” *Id.* Nowhere did the email
 18 clarify that these actions would not happen **unless the RP first made a report to law**
 19 **enforcement.** *Id.*

20 Uber had an obligation to minimize barriers for reporting sexual violence for clients who
 21 experience sexual assault. Jeglic Decl. at ¶ 15. But instead, it misled the RP. Had Uber given the
 22 RP clear information or offered to help her make the report to law enforcement, she likely would
 23 have reported the incident to police. Ponton Decl. at ¶¶ 5-10. This likely would have resulted in a
 24 criminal investigation and criminal prosecution of Mr. Sherman. Pfeffer Decl. at ¶¶ 9-23.

25 **3. Uber took no action to protect its riders from the foreseeable risk that**
 26 **Mr. Sherman would exploit its platform to assault more women.**

27 Uber knows that people who have committed sexual assault may go on to reoffend. (Baker
 28 Vol. I at 143:14-19.) However, after the January 5, 2018 incident, **Uber admits it did nothing**

1 **whatsoever to protect its riders against assaults by Mr. Sherman.** (Baker Vol. I at 130:4-11.)
 2 Its communications to Sherman were not designed to protect riders or prevent future incidents.
 3 (Baker Vol. I at 95:8-16 & 116:21-117:6.)

4 **D. Uber Negligently Increased the Risk of Sexual Assault Even Further by**
 5 **Allowing Ride Requests on Behalf of Inexperienced Guest Riders with No**
 6 **Working Phones.**

7 **1. Uber does not tell its riders that it is dangerous to rely on its trade dress**
 8 **to identify safe rides, nor does it give them clear and consistent**
 9 **directions on what they should use instead of the trade dress.**

10 As shown above, an Uber rider may reasonably believe she is safe so long as she gets into
 11 a vehicle bearing Uber trade dress, which indicates affiliation with Uber's brand and therefore
 12 trustworthiness. She may reasonably assume that any additional tools Uber provides are to help a
 13 rider, for convenience' sake, distinguish her Uber from another rider's equally safe Uber. See
 14 discussion, *supra*; see also Rando Decl. at ¶ 45.

15 Uber, on the other hand, knows about its practice not to control the distribution of its trade
 16 dress. Peters Decl., Exh. 7 at 218:22-219:9 (not aware of any steps Uber takes to prevent
 17 unauthorized users from putting Uber's trade dress on their vehicles.) Uber knows that rider
 18 **safety**, not mere convenience, depends on riders getting into the right car. Peters Decl., Exh. 7 at
 19 43:24-44:3, Exh. 2 to Stormer Depo. Uber knows that some (unidentified) percentage of people
 20 utilized the presence of a decal to identify their ride. Peters Decl., Exh. 3 at 124:16-24. This is
 21 even though, before August 2018, **Uber did not “do anything to try to find out if Uber riders**
 22 **were sometimes getting into cars simply because they had a logo decal.”** Peters Decl., Exh. 9
 23 at 139:25-140:3; see also 60:22-25, 63:2-17, 139:25-142:13, 142:14-18, and 142:14-144:9. Uber
 24 knows that it must provide reliable tools, and make sure its riders are using them to “get into the
 25 right car.” Peters Decl., Exh. 7 at 66:21-67:17; see Donndelinger Decl. at ¶¶ 39-50; Rando Decl. at
 26 ¶¶ 10-31.

27 There were numerous ways Uber could have designed its platform to match riders and
 28 drivers. Donndelinger Decl. at ¶¶ 14-51; Rando Decl. at ¶¶ 10-33; Peters Decl. Exh 20 (Rando
 Depo.) at 202:8-205:18. Incredibly, rather than study what were the best tools to reliably deliver
 its riders into the right car, Uber designed its system by asking a handful of riders what tools they

1 “want.” Peters Decl., Exh. 9 at 194:21-196:25.

2 Uber cannot argue that riders like Ms. Doe should have known to rely on in-App tools
3 rather than its trade dress to identify safe rides. Even Uber’s Global Director of Project
4 Management does not know exactly what information riders **should** check in order to safely get
5 into a car using the Uber app. Peters Decl., Exh. 9 at 206:12-20. Uber certainly does not know
6 what riders **do** use to identify their rides, but it thinks that at least some users probably use “some”
7 or a combination of information from the app. Peters Decl., Exh. 9 at 201:7-10. Prior to August
8 2018, Uber never conducted a single study devoted to finding out what riders were relying on to
9 identify their ride. Peters Decl., Exh. 9 at 117:20-23; 126:21-15 (no simulation testing); 128:16-
10 130:3 (no field testing.) It did not analyze why Uber riders were ending up in imposter Uber
11 vehicles. Peters Decl., Exh. 6 at 125:16-126:2.

12 Not surprisingly, Uber’s approach resulted in a steady stream of Uber riders getting into
13 the wrong car. In a market survey of riders, 35 percent said they sometimes, often, or almost
14 always had difficulty finding the car/driver. Peters Decl., Exh. 12 at 70:17-71:3. Slide 27 of
15 Exhibit 3 to the Deposition of Abbie Ding shows that rider awareness of the safety features of the
16 app was low. *Id.* at 69:23-70:14. In 2016, Uber estimated that every week, at two New York
17 airports alone, 2,300 of its riders getting into the cars of people posing as Uber drivers. RFJN,
18 Exh. C (Uber letter to Port Authority). An Uber presentation titled the “Wrong Uber Project”
19 reflects that, excluding safety-related incidents, Uber had 2.3 known million Wrong Driver
20 incidents in 2018. Peters Decl., Exh. 6 at 41:14-43:11, Exh. 2 to Baker Depo. at p. 59; see Peters
21 Decl., Exh. 9 at 185:15-186:4; Peters Exh., Decl. 6 at 45:15-46:25. These “wrong Uber” incidents
22 may be limited to incidents where an actual Uber rider gets into an actual Uber car, but it’s just the
23 wrong car (Peters Decl., Exh. 9 at 178:19-180:16, Exh. 7 to Dhawan Depo) leading to “costly
24 support tickets for Uber.” Peters Decl., Exh. 9 at 185:15-186:4.

25 Uber asserts that Jane Doe was “aware that a license plate is one way for riders to verify
26 they are getting into the vehicle they are matched with in the Uber App.” Uber Mtn. 3:25-27.
27 Knowing that certain tools are available as an option is not the same as knowing that they are
28 necessary for a safety purpose. **Uber never even told riders that they should not rely on the**

1 **presence of an Uber decal to indicate that a driver is an Uber Driver.** Peters Decl., Exh. 23
 2 (2021-06-30 RFPD1 Uber Supplemental Resp. No. 57) [none of the documents Uber identifies is
 3 responsive]. **Uber cannot identify any time that it warned riders that getting into the wrong**
 4 **car could put them at risk for sexual assault.** Peters Decl., Exh. 2 at 247:2-250:8.

5 **2. Uber further increases the risk of sexual assault by allowing App users**
 6 **to call for a ride on behalf of a third-party guest at a remote location**
 7 **even if the guest is inexperienced with Uber or does not have a working**
 8 **phone.**

9 Making matters worse, Uber explicitly allows app users to request rides on behalf of guests
 10 who do not have access to cell phones. Peters Decl., Exh. 7 at 104:3-105:24. Uber's does not try to
 11 ensure these riders possess operational phones. Peters Decl., Exh. 15 at 51:16-22. It advertises this
 12 service as appropriate if "grandma" does not have a "smartphone." Peters Decl. Exh 21 (Koestner
 13 Depo), & Exh. 6 to Koestner. Uber's retained expert tried and failed to explain how someone
 14 without a working smartphone could receive a text with tools to identify a ride. Exh. 21 at 92:8-
 15 93:24.

16 The top reasons why Uber users request rides for guests include (1) the guest's phone
 17 battery died (Peters Decl., Exh. 15 at 281:21-24), and (2) the guest's "lack of familiarity with the
 18 app." *Id.* at 282:9-15, 290:2-17; Peters Decl., Exh. 15 at 290:19-291:1. Not having access to a
 19 working cell phone during guest rides was a highly foreseeable user circumstance that Uber had an
 20 obligation to anticipate. Donndelinger Decl. at ¶¶ 32-33. Uber could have prohibited or placed
 21 restrictions on these types of guest rides. Donndelinger Decl. at ¶¶ 31-38; Rando Decl. at ¶¶ 31-37.
 22 By allowing this type of ride, Uber increased the chances that these guest riders (who had no
 23 working cell phones and therefore no access to any identifying information about the driver)
 24 would get into the car of someone posing as an Uber driver. Donndelinger Decl. at ¶¶ 31-38.
 25 Indeed, when Uber gathered data regarding guest rides in Latin America, it found that these rides
 26 were associated with an increased risk of sexual assault. *Id.* at 259:24-260:11.

27 **E. Uber's negligence was a substantial factor in causing harm to Plaintiff Jane**
 28 **Doe.**

When Ms. Doe was assaulted by Sherman on August 18, 2018, it was only eight months

1 since Sherman's January 5, 2018 sexual assault on Uber's platform. If Uber had helped that prior
 2 victim to report to law enforcement, there is a probability that Sherman would have still been
 3 subject to pending criminal charges for sexual battery in August. Pfeffer Decl. at ¶¶ 9-23. Instead,
 4 given that he had successfully exploited Uber's platform to kidnap and assault two women, with
 5 no resulting criminal investigation and only gentle reprimands about "flirtation," he was probably
 6 feeling emboldened. Jeglic Decl. at ¶¶ 13. This likely was a substantial factor in his decision to re-
 7 offend on January 5, 2018. Jeglic Decl. at ¶¶ 5-7, 13, 18. Additionally, Sherman still had Uber's
 8 trade dress on his vehicle, and as an experienced Uber driver, he knew how to use the trade dress
 9 as a tool to lure Ms. Doe into his car. That is exactly what happened.

10 Before the incident, Ms. Doe had seen Uber marketing about the safety of its rides, and
 11 believed it was a company that "trustable," easy to use, and friendly. Peters Decl., Exh. 16
 12 (Deposition of Jane Doe, Vol. I) at 18:13-20. She had only used Uber a handful of times,⁴ and
 13 understood Ubers to be a type of "taxi car." Peters Decl., Exh. 17 (Deposition of Jane Doe, Vol. II)
 14 at 173:17-24; Peters Decl., Exh. 16 at 18:21-22; 24:18-22. When Ms. Doe (who is from Mexico,
 15 where Ubers do not use any trade dress) arrived in San Francisco a few [SP1][KSC2]days before the
 16 incident for a vacation with her boyfriend, she saw Uber decals for the first time and thought they
 17 were very useful for identifying Ubers. Peters Decl., Exh. 17 at 173:17-24.

18 After shopping by herself for the day, Ms. Doe asked her boyfriend to call her an Uber
 19 because her battery was dying. Peters Decl., Exh. 18 (Depo. of Arias at 77:4-8). He did so and, by
 20 the time the vehicle arrived, her battery was dead. Peters Decl., Exh. 16 at 66:19-67:12. One
 21 reason Jane Doe believed Sherman was her Uber driver is because he had Uber's decal sticker. *Id.*
 22 at 64:3-8, 110:13-111:1; Peters Decl., Exh. 17 at 176:18-177:11.⁵ As discussed above, Ms. Doe's
 23

24 _____
 25 ⁴ In Mexico, her home country, Ms. Doe had only used Uber once where she called for the ride
 26 herself (Peters Decl., Exh. 16 at 26:9-11), and only 3-5 times where someone else called for a ride
 27 for her (*Id.* at 20:1-6), and of those times she rode with others at least two times (*Id.* at 20:9-
 28 22:24). She thought the method for identifying her Uber ride was that it showed up to her
 location. *Id.* at 118:7-10.

⁵ He also came to her location. Peters Decl., Exh. 16 at 53:15-18; Peters Decl., Exh. 17 at 176:18-
 177:11. When she approached the car, there was additional confirmation. He seemed to have an
 Uber app open, seemed to be acting like an Uber driver, and seemed to say her boyfriend's name.
 Peters Decl., Exh. 16 at 63:20-64:22; 64:3-10.

1 belief that she could rely on the decal was entirely reasonable and foreseeable, especially in the
 2 context of a guest ride. In other words, the fact that Uber had allowed Mr. Sherman to keep its
 3 trade dress was a substantial factor in causing Ms. Doe to get into his vehicle. It is undisputed that
 4 Ms. Doe went on to suffer grave harm. She was kidnapped, raped, and strangled.

5 **III. ARGUMENT**

6 **A. Applicable Standard**

7 “In ruling on a motion for summary judgment, [t]he evidence of the nonmovant is to be
 8 believed, and all justifiable inferences are to be drawn in his favor.” *Tolan v. Cotton*, 572 U.S.
 9 650, 651 (2014) (quotation marks and citation omitted). *Hahn v. Select Portfolio Servicing, Inc.*,
 10 424 F.Supp.3d 614, 624 (N.D. Cal. 2020). “[A]lthough the court should review the record as a
 11 whole, it must disregard all evidence favorable to the moving party that the jury is not required to
 12 believe.” *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150-51 (2000).

13 “When interpreting state law, federal courts are bound by decisions of the state's highest
 14 court.” *P.S.M. Holding Corp. v. Nat'l Farm Fin. Corp.*, 884 F.3d 812, 820 (9th Cir. 2018)
 15 (quotation marks and citation omitted). Only “[i]n the absence of such a decision” must a
 16 “federal court [] predict how the highest state court would decide the issue using intermediate
 17 appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as
 18 guidance.” *Id.* (internal quotation marks and citation omitted) (emphasis added). The Ninth Circuit
 19 recognizes: “Decisions of the six district appellate courts are persuasive but do not bind each other
 20 or us, although we generally will follow a published intermediate state court decision regarding
 21 California law unless we are convinced that the California Supreme Court would reject it.”
 22 *Tompkins v. 23andMe, Inc.*, 834 F.3d 1019, 1025 (9th Cir. 2016) (quotation marks and citation
 23 omitted) (emphasis added); *see also In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990).

24 **B. Summary Judgment Should Be Denied Because There Is a Genuine Dispute of** 25 **Material Fact as to Whether Uber Delivered Its Service in a Manner that** **Foreseeably and Unreasonably Increased the Risk of Assault.**

26 **1. Under California law, Uber owes its riders a duty not to deliver its** 27 **services in a manner that foreseeably and unreasonably increases the** **risk of assault.**

28 **(a) Binding California Supreme Court authority supports finding a**

duty.

There is long-standing authority from California’s highest court that is binding here. *See P.S.M. Holding Corp.*, *supra*, 884 F.3d at 820. Just last year, the California Supreme Court reiterated the general, well-established rule that the duty of care includes a duty to protect or warn when one’s actions create or increase a risk that others will be injured, whether directly or by third parties. *Brown v. USA Taekwondo*, 11 Cal.5th 204, 214 n.5 (2021) [hereafter *Brown*]. Civil Code section 1714 codifies the common law “default rule that each person has a duty ‘to exercise, in his or her activities, reasonable care for the safety of others.’” *Brown*, 11 Cal.5th at 214 (citation omitted). This “general duty of care” is imposed “on a defendant only when it is the defendant who has ‘created a risk’ of harm to the plaintiff, including when ‘the defendant is responsible for making the plaintiff’s position worse.’” *Id.* (citations omitted). “[T]he relevant legal question is whether the defendant has engaged in activities that created or increased the plaintiff’s risk of harm.” *Id.* at 214 n.5. The converse is also true: a “‘person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another’ from that peril.” *Brown*, 11 Cal.5th at 214 (citation omitted). But that “no-duty-to-protect rule will not relieve the defendant of an otherwise applicable duty to exercise reasonable care when, by its own conduct, the defendant has increased the risk of harm to the plaintiff.” *Id.* at 215 n.7.

The California Supreme Court warned in *Brown* that the traditional verbiage used to distinguish increasing a risk (“misfeasance”) and just being a bystander who does not help (“nonfeasance”) “is imprecise and prone to misinterpretation. ‘The proper question is not whether an actor’s failure to exercise reasonable care entails the commission or omission of a specific act.’ Restatement (Third) of Torts § 37 & cmt. c (Am. Law Inst. 1975). Rather, it is ‘whether the actor’s entire conduct created a risk of harm.’” *Id.* As Justice Cuéllar put it in his concurrence, “[t]he person who sets the stage owes the players a general duty to exercise reasonable care. . . . The organizer, by bringing people together, may ‘creat[e] the risk’ even if less directly than a criminal or intentional tortfeasor.” *Id.* at 226–227 (2021) (Cuéllar, J., concurring).

The Supreme Court expressed these same principles in *Weirum v. RKO General, Inc.*, 15 Cal.3d 40 (1975) (radio station liable when participants in radio contest’s sponsored road race

1 predictably drove negligently and caused a collision resulting in injuries), distinguishing between
 2 a defendant's liability for "creation of an unreasonable risk of harm" as opposed to its lack of
 3 liability for a failure to beneficially intervene. *Id.* at 49. It dismissed fears that its holding would
 4 lead to "unwarranted extensions of liability" since, it said, the defendant's risk creation was not
 5 merely the ordinary and unavoidable risk inherent to commonplace commercial activities. *Id.* at
 6 48. "It is true, of course, that virtually every act involves some conceivable danger. Liability is
 7 imposed only if the risk of harm resulting from the act is deemed unreasonable—i.e., if the gravity
 8 and likelihood of the danger outweigh the utility of the conduct involved." *Id.* at 47-48 (citations
 9 omitted).

10 Since *Weirum*, the California Supreme Court has twice discussed the duty not to expose
 11 someone to an unreasonable risk of injury at the hands of third parties, once in *Brown*, discussed
 12 *supra*, and once in *Lugtu v. California Highway Patrol*, 26 Cal.4th 703 (2001). In *Lugtu*, the Court
 13 held that a highway patrol officer had a duty to protect the Lugtus because he caused them to stop
 14 their car on the center median strip of the highway and they were then struck by an oncoming
 15 truck. *Id.* at 707. The Court recognized that the "basic tort principle recognizing that the general
 16 duty of due care includes a duty not to expose others to an unreasonable risk of injury at the hands
 17 of third parties" applied. *Id.* at 717. *Lugtu* is not based on any special duty imposed on police
 18 officers. Indeed, police officers have no greater duty of care than any ordinary person. *Williams v.*
 19 *State of California*, 34 Cal.3d 18, 24 n. 3 (1983). Instead, it is expressly based on the "general duty
 20 of due care. . . ." *Id.* at 716–717. Obviously, Officer Hedgecock did not encourage the oncoming
 21 truck driver to strike the Lugtus' car, nor was the truck driver's negligence a necessary component
 22 of Officer Hedgecock's conduct. But he had a duty of care because his own conduct caused the
 23 Lugtus to be in a more dangerous situation than they otherwise would have been in.

24 Indeed, this has long been the common law rule. *See, e.g., Richardson v. Ham*, 44 Cal.2d
 25 772, 777 (1955). In *Richardson*, members of a construction partnership who were engaged in earth
 26 moving operations were held liable for leaving their bulldozer unlocked and accessible for a third
 27 party's misuse. *Id.* at 774. The plaintiffs brought action against the bulldozer's owners and
 28 operators for negligently failing to lock it before it was obtained by assailants who drove the

1 bulldozer into the plaintiffs’ property and caused injury. *Id.* at 774-775. Given the foreseeable risk
 2 of intermeddling by third party assailants and the accessibility of the bulldozer, there was a high
 3 risk of injury posed the defendant’s failure to control and authorize the operation of the machine.
 4 *Id.* at 777. In *Richardson*, the defendants did not encourage drunken young men to joyride on
 5 defendants’ bulldozer and leave it on top of a hill where it would roll down, uncontrolled, through
 6 traffic and a house. *Id.* 44 Cal.2d at 774-775. Defendants’ conduct—leaving the bulldozer
 7 unsecured—merely caused or increased the risk of danger. *Id.* at 777. Defendants were liable, not
 8 because the young men’s conduct was a necessary component of the Defendants’ construction
 9 activity, but because the “extreme danger created by a bulldozer in uncontrolled motion and the
 10 foreseeable risk of intermeddling fully justify imposing a duty on the owner to exercise reasonable
 11 care to protect third parties from injuries arising from its operation by intermeddlers.” *Id.* at 776.

12 And in *McEvoy v. American Pool Corp.*, 32 Cal.2d 295 (1948), defendants were liable for
 13 failing to warn about the “inherently dangerous nature of the chemicals” they provided their
 14 employees to transport, and took no steps to protect third parties who might be injured if the glass
 15 containers with those chemicals broke. *Id.* at 297-298. There was no suggestion the defendants
 16 encouraged their employee to expose his mother to chlorine gas and hydrochloric acid. *Id.*

17 **(b) The recent California appellate decision is a non-binding outlier.**

18 The second district court of appeal in *Uber Techs., Inc.* imposed two significant limitations
 19 nowhere mentioned in California’s Supreme Court precedent: that the defendant urged the third
 20 party to commit misconduct and that the third-party crime was a “necessary component” of
 21 defendant’s conduct. *Jane Doe No. 1 v. Uber Techs, Inc.*, 79 Cal. App. 5th 410, 425, 427-28
 22 (2022) [hereafter “*Uber Techs.*”] (holding a duty only arises “where the defendant actively urges
 23 the third party to act in the inherently dangerous manner that injured the plaintiff.”) These
 24 limitations are not consistent with the common law rule, prior case law, Supreme Court authority,
 25 or common sense. If these limitations were adopted on a large scale, companies like Uber would
 26 effectively be immune from responsibility for negligently exposing customers to third party
 27 criminal conduct in order to maximize profits, since it is hard to imagine a scenario where third
 28 party criminal conduct is a “necessary component” of corporate conduct or “urged” by corporate

1 actors.

2 The court of appeal in *Uber Techs.* improperly drew the “necessary component” limitation
 3 from a factual distinction between two prior appellate cases, *Weirum, supra*, and *Sakiyama v. AMF*
 4 *Bowling Centers, Inc.* 110 Cal.App.4th 398 (2003), ignoring that those cases do not present the
 5 only possible manner of placing people at risk. The *Uber Techs.* court read the court’s opinion in
 6 *Weirum* as requiring that “the plaintiff was injured by third parties doing exactly what the
 7 defendant’s conduct encouraged them to do. . . .” *Uber Techs., Inc.*, 79 Cal.App.5th at 425. The
 8 court opined that “encouragement” of the third party is “a defining feature of *Weirum*
 9 misfeasance.” *Uber Techs., Inc.*, 79 Cal.App.5th at 425; *see Sakiyama*, 110 Cal.App.4th at 409.
 10 That is a valid factual distinction between *Weirum* and *Sakiyama*, but it does not define the legal
 11 test for a duty of care.

12 The Court of Appeal also cited *Melton v. Boustred*, 183 Cal.App.4th 521 (2010) where the
 13 court found that hosting an open party advertised on MySpace did not make a homeowner liable
 14 for an assault at the party. The basis for the holding in *Melton* was the lack of active conduct
 15 increasing the risk of harm: “[W]e conclude defendant did not engage in any active conduct that
 16 increased the risk of harm to plaintiffs.” *Id.* at 533. *Melton* observed that the “necessary
 17 component” language was the “crux of the difference between” the facts in those cases and
 18 *Weirum*, but unlike *Uber Techs.*, *Melton* did not adopt “necessary component” as a legal test
 19 distinguishing between misfeasance (creating a duty) and nonfeasance (creating no duty).

20 The genuine distinction between *Melton* and *Sakiyama* versus *Weirum* is that the former
 21 cases involve only the ubiquitous risk inherent in commonplace business activities (such as the
 22 operation of a bar, restaurant, or similar establishment).

23 2. There Is a Genuine Issue of Disputed Fact as to Whether Uber 24 Foreseeably and Unreasonably Increased the Risk of Sexual Assault.

25 Applying the standard articulated by California’s highest court and set forth in the
 26 Restatement, Uber has a duty not to unreasonably increase the risk of injury to others, and also to
 27 protect others against those risks it negligently causes. *See Brown, supra*, 11 Cal.5th 204; *Lugtu,*
 28 *supra*, 26 Cal.4th 703; *Weirum, supra*, 15 Cal.3d 40; *Richardson, supra*, 44 Cal.2d 772; and

1 *McEvoy, supra*, 32 Cal.2d 295; *see also* Restatement (Third) of Torts § 37 & cmt. c (Am. Law
 2 Inst. 1975). It does not matter that abduction and rape are not “necessary component[s] of the Uber
 3 business model.” *Id.* at 427. What matters, under California law, is that Uber negligently created a
 4 risk that its riders would be injured by criminals posing as Uber drivers, and that this was more
 5 than the ordinary risk of harm inherent in commonplace business activities. *See Weirum*, 15 Cal.3d
 6 at 47-49.

7 Uber’s negligent risk creation includes, as discussed above, supplying its trade dress to Mr.
 8 Sherman and thereby indicating to the public that he was a trustworthy driver affiliated with Uber,
 9 but then, after learning that Sherman was a sexual predator exploiting the platform to prey on its
 10 riders, taking no steps to retrieve its trade dress from him even though it knew riders relied on the
 11 trade dress and might be sexually assaulted as a result. (Section II.B, *supra*.) It also includes, after
 12 learning of the January 5, 2018 sexual assault, shielding Mr. Sherman from criminal investigation
 13 and prosecution, emboldening him by shrugging off his first kidnapping and assault as potential
 14 “flirtation,” praising him as a valued partner, and allowing him to keep driving for Uber for a time.
 15 (Section II.C, *supra*.) Finally, Uber’s negligence includes ignoring the data that show its riders
 16 were being assaulted due to their trust in drivers apparently affiliated with Uber, and therefore
 17 failing to give its riders, including Ms. Doe, direction and tools to reliably deliver them into safe
 18 Ubers as opposed to the vehicles of people posing as Uber drivers; and also its negligence includes
 19 allowing rides to be requested for guests like Ms. Doe who do not have a working cell phone, and
 20 are therefore almost forced to rely on the Uber decal as the means to identify their ride. (Section
 21 II.D, *supra*.)⁶

22
 23 ⁶ Even if *Uber Techs.*’ opinion were otherwise binding, Uber is incorrect that this Court would be
 24 “obligated to follow” its holding addressing “Plaintiff’s negligence claim against Uber” in the
 25 instant case. (See Uber Mtn. 12:14-15.) California appellate courts review denial of a motion for
 26 leave to amend for abuse of discretion. *Royalty Carpet Mills, Inc. v. City of Irvine*, 125
 27 Cal.App.4th 1110, 1124 (2005). When amendment would be futile, the trial court does not abuse
 28 its discretion in denying leave to amend. *Id.* In *Uber Techs.*, the fact pattern before the trial court
 did not appear to involve former Uber drivers, nor drivers whom Uber had directly provided with
 its trade dress, nor guest ride requests, and thus the same allegations that might be futile in one
 case because they only supply context, might give rise to a distinct theory in another case.

C. Summary Judgment Should Also Be Denied Because Uber Undertook Services That It Should Have Recognized Were Necessary for the Protection of Its Riders

In addition to its duty not to act in a way that puts other people at risk, Uber has a duty, when it undertakes to act for the benefit of a third party, to do so reasonably:

[O]ne who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person . . . is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care in his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965); *see also Paz v. State of California*, 22 Cal.4th 550 (2000) (setting out elements of claim). Accordingly, a rail operator who has contracted to provide checkpoint procedure may be liable to third party beneficiary if “an imposter posing as [] driver” stole the shipment from the yard. *See Intercargo Ins. Co. v. Burlington Northern Santa Fe RR*, 185 F.Supp.2d 1103, 1113 (C.D. Cal. 2001) (applying California law). And a restaurant employee may be liable for failing to follow through on his agreement to withhold a patron’s car keys if the patron was not fit to drive his vehicle after leaving the restaurant. *Williams v. Saga Enterprises, Inc.*, 225 Cal.App.3d 142 (1990).

Here, Uber undertakes to “match riders who need a ride with drivers who are online and available to provide a ride.” (RFJN Exh. B at pp. 2 & pp. 68; Decl. of Peters Exh. 4 at 29:10-16.) If it fails to do so reasonably, as set forth above, it should be liable.

D. Summary Judgment Should Also Be Denied Because Uber Owed, and Violated, a Duty to Protect Jane Doe Based on a Special Relationship Characterized by Her Dependence on Uber’s Ride-Matching Service

A separate ground for denying Uber’s motion is that Uber is in a special relationship with Plaintiff Jane Doe that gives rise to a duty to protect her. Classic examples of special relationships include those between store proprietors and customers, innkeepers and invitees, and common carriers and their passengers. *See Regents of University of California v. Superior Court*, 4 Cal.5th 607, 620 (2018) citing Restatement (Third) of Torts § 40b (1975). Technology has given rise to new forms of business relationships where interactions are hosted on invisible “platforms” rather

1 than physical properties. But special relationships are not defined by an exhaustive list, but by
 2 unifying principles. Under those principles, there is equal basis for a duty to be recognized
 3 between Uber and its riders as there is between a store proprietor and its customers.

4 The set of special relationships that gives rise to a duty is not set in stone but evolving.
 5 “The Restatement authors observed over 50 years ago that the law has been “working slowly
 6 toward a recognition of the duty to aid or protect in any relation of dependence or of mutual
 7 dependence.” *Regents, supra*, 4 Cal.5th at 620-621 citing Restatement (Second) of Torts § 314A
 8 & *cmt. b* (1965). In California, the defining characteristics of a special relationship are (1) “an
 9 aspect of dependency in which one party relies to some degree on the other for protection” and the
 10 “other has superior control over the means of protection” or “some control over the plaintiff’s
 11 welfare” (*Regents, supra*, at 620-21), (2) usually “defined boundaries” that “create a duty of care
 12 owed to a limited community not the public at large” (*Brown, supra*, 40 Cal.App.5th at 1092),
 13 and, usually, “benefit” to the party charged with the duty of care (i.e., the benefit to a retail store or
 14 hotel by receiving visits from customers and guests) (*id.* at 607, 621).

15 In 2018, the California Supreme Court in the *Regents* case found that a college-student
 16 relationship (with adult students) fits within the paradigm of a special relationship during
 17 curricular activities, since students “are comparatively vulnerable and dependent on their colleges
 18 for a safe environment” and colleges “have a superior ability to provide that safety with respect to
 19 activities they sponsor or facilities they control.” *Id.* at 607, 625 (finding that UCLA may have
 20 been negligent in failing to prevent attack by fellow student with known propensities); *see also*
 21 *Dix v. Live Nation Entertainment, Inc.*, 56 Cal.App.5th 590, 608 (2020) (a special relationship was
 22 found between an electronic music festival and its invitees because “attendees were dependent on
 23 Live Nation,” the festival operator for security and medical services).

24 Here, just as a store proprietor or restaurant has more control than its customers over
 25 making the environment safe, Uber has more control than its riders in making the environment
 26 safe on its “platform.” Uber riders depend on Uber to conduct background checks, select safe
 27 drivers, identify its affiliated drivers using trade dress, and provide other safeguards to ensure
 28 riders do not inadvertently get into criminals’ cars. (See Sections A.1 & B.1, *supra*, and Peters

Decl., Exh. 4 at 35:7-19.) As Uber’s Senior Law Enforcement Liaison agreed: “Every time someone opens the Uber app, they are putting their trust in Uber to not only get them from place to place but to help keep them and their loved ones safe.” Peters Decl., Exh. 7 at 158:25-159:13; see also Peters Decl., Exh. 4 at 34:19-35:5 (“riders do depend on Uber to provide them with a safe trip”). There is also a large information disparity between Uber and its riders regarding the on-platform risks, and a disparity in their ability to study and address those risks. (Section D.1, *supra*.) At the time she was attacked, Ms. Doe was an Uber rider who was a guest or invitee on its platform. As such, she was in a special relationship that required Uber to use reasonable care in protecting her against foreseeable risks of harm.

E. The Rowland Factors Do Not Support Limiting Uber’s Duty

The *Rowland* factors do not remotely support limiting the duties Uber otherwise owes to plaintiff here. These “factors fall into two categories. The first group involves foreseeability and the related concepts of certainty and the connection between plaintiff and defendant. The second embraces the public policy concerns of moral blame, preventing future harm, burden, and insurance availability.” *See Doe v. Roman Catholic Archbishop of Los Angeles*, 70 Cal.App.5th 657, 673–674 (2021) (citations omitted). “The most important factor to consider . . . is whether the injury in question was foreseeable.” *Id.* Foreseeability is the “most important factor to consider” and is about “generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.” *Id.* at 675–676 (citations omitted). Even rare events may be foreseeable. *Regents, supra*, at 629. Here, given the nature of Uber’s business, its exploitation by criminals posing as Uber drivers to gain riders’ trust was highly foreseeable. In fact, these occurrences were known to Uber to be regularly occurring. In addition, the burden to Uber of telling its riders the truth would be minimal.

F. Proximate Cause and Superseding Intervening Cause

Uber’s proximate cause argument is misguided. The California Supreme Court cites with approval the Restatement of Torts section 449: “If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent,

1 such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the
 2 actor from being liable for harm caused thereby.” Restatement of Torts § 449 (1965); *McEvoy v.*
 3 *American Pool Corp.*, 32 Cal.2d 295, 298-299 (1948); *Benton v. Sloss*, 38 Cal.2d 399, 405 (1952);
 4 *Richardson v. Ham*, 44 Cal.2d 772, 777 (1955). Here, the risk that materialized and affected
 5 Plaintiff Jane Doe was the very risk that Uber should have anticipated, and which it was negligent
 6 for not addressing.

7 **G. Punitive Damages**

8 Under California Civil Code 3294(a), Jane Doe is entitled to punitive damages if she
 9 shows by clear and convincing evidence that Uber was guilty of oppression, fraud, or malice.
 10 Malice, for purposes of this section, is “conduct which is intended by the defendant to cause injury
 11 to the plaintiff or despicable conduct which is carried on by the defendant with a willful and
 12 conscious disregard of the rights or safety of others.” Cal. Civ. Code § 3294(c).

13 There is evidence that Uber engaged in intentional concealment as well as despicable
 14 conduct through its refusal to even acknowledge, study, or gather data regarding the risks of grave
 15 harm to its riders at the hands of third-party criminals. “Conscious disregard for the safety of
 16 another may be found ‘where the defendant is aware of the probable dangerous consequences of
 17 his or her conduct and he or she willfully fails to avoid such consequences.’” *Johnson & Johnson*
 18 *Talcum Powder Cases*, 37 Cal. App. 5th 292, 332 (2019), review denied (Oct. 23, 2019). Uber is
 19 not entitled to summary judgment on Plaintiffs’ punitive damages claim.

20 **IV. CONCLUSION**

21 For these reasons, Defendant Uber’s motion for summary judgment or summary
 22 adjudication should be denied.

23 Dated: July 21, 2022

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